No. ~~L-10245~~

United States

Circuit Court of Appeals

For the Ninth Circuit

LOUIS BRANDAW, Guardian of the Estate and Person of Charles E. Brandaw, an incompetent,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

DEMPSEY KIMSEY & DOWNS, PRINTERS

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NAME AND ADDRESSES OF ATTORNEYS OF RECORD.

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For the Plaintiff in Error.

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For the Defendant in Error.

In this brief, we hereinafter refer to the Plaintiff in Error as the plaintiff and to the Defendant in Error as the defendant.

This is an action upon a policy of War Risk Insurance, filed by Louis Brandaw, as guardian of the estate and person of Charles E. Brandaw, an incompetent, against the United States of America.

The complaint alleges jurisdictional residence; the entering of the military service of the United States on August 25, 1918, and honorable discharge therefrom October 21, 1918, and application for and issuance to him of the policy in the sum of Ten Thousand ($10,000.00) Dollars; the payment of the premiums provided by law, until his discharge; the lapse date of the policy, and the maturity of the policy by reason of permanent and total disability, and finally, the disagreement upon which this action is premised.

The answer is an admission of all allegations of the complaint save the maturity of the policy by reason of permanent and total disability. The answer further pleads the statute of limitations, but this plea is not at this time pertinent to the issues herein raised.

The case was tried September 29, 1928, before a jury. A verdict was returned in favor of the defendants and against the plaintiff. Plaintiff prosecutes this appeal and assigns as error the refusal of the trial court to give plaintiff's requested instruction Number VII.

The said requested instruction was:

> "You are instructed that under the law every enlisted man, or any other member employed in the active service under the war department or navy department, who was discharged prior to July 2, 1921, and who was in active service on or before November 11, 1918, shall be conclusively held and taken to have been in a sound condition when examined, accepted and enrolled for service, except as to defects, disorders and infirmities made of record in any manner by proper authorities of the United States at the time or prior to inception of active service. The law further provides that any ex-service man, who is shown to have had, prior to January 1, 1925, a neuro-psychiatric disease, which developed a 10% degree of disability shall be presumed to have acquired his disability in such service between April 6, 1917, and July 2, 1921, but said presumption shall be rebuttable by clear and convincing evidence. It is admitted that this man was suffering from a neuro-psychiatric disease prior to January 1, 1925, and developed more than a 10% degree of disability from the date of his discharge, and it is a question of fact for you to determine whether or not the presumption which the law provides has been rebutted in this case by clear and convincing evidence."

ARGUMENT

The sole question to be determined in this case is whether or not Chapter 10, Section 471, of Title 38, Page 219, United States Code Annotated, is applicable to this case.

The section reads as follows:

"Sec. 471. **Compensation for death or disability; to whom payable and for what causes payable; presumptions as to soundness of condition and time of acquisition of disabilities.** For death or disability resulting from personal injury suffered or disease contracted in the military or naval service on or after April 6, 1917, and before July 2, 1921, or for an aggravation or recurrence of a disability existing prior to examination, acceptance, and enrollment for service, when such aggravation was suffered or contracted in, or such recurrence was caused by, the military or naval service on or after April 6, 1917, and before July 2, 1921, by any commissioned officer or enlisted man, or by any member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) when employed in the active service under the War Department or Navy Department, the United States shall pay to such commissioned officer or enlisted man, member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) or, in the discretion of the director, separately to his or her dependents, compensation as hereinafter provided; but no compensation shall be paid if the injury, disease, aggravation, or recurrence has been caused by his own willful misconduct; PROVIDED, that no person suffering from paralysis, paresis, or blindness shall be denied compensation by reason of willful misconduct, nor shall any person who is helpless or bedridden as a result of any disability be denied compen-

> sation by reason of willful misconduct. For the purposes of this section every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department who was discharged or who resigned prior to July 2, 1921, and every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department on or before November 11, 1918, who on or after July 2, 1921, is discharged or resigns, **shall be conclusively held and taken to have been in sound condition when examined**, accepted, and enrolled for service, except as to defects, disorders, or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service, to the extent to which any such defect, disorder, or infirmity was so made of record. . . "

The law pertaining to relief for World War Veterans is in three parts, and is referred to as the World War Veterans Act. The law deals with one subject matter and one only, to-wit: the relief of World War Veterans.

We have copied above the plaintiff's requested instruction Number VII, and the instruction which the Court gave insofar as it may be material to this issue, was as follows:

> "Now there has been a question raised in this case as to Brandaw's condition at the time of his enlistment or the time that he was inducted into the army. I think it is fair to assume in the absence of evidence to the contrary that he was at that time in good substantial health, because otherwise he would not have been inducted into the army, because they were looking for able and healthy young men, and when he was

inducted into the army it is fair to assume that he was found to be in that condition, but if it should appear and you should believe from the testimony that prior to his induction into the army and prior to the issuance of the policy he was totally and permanently disabled so that he was not then able to continuously follow a gainful occupation it would necessarily follow that his disability could not have occurred after the issuance of the policy, and the Government would not be liable, because the terms and the conditions of the policy had not been broken, but if Brandaw had nothing more than what the doctors designated as a predisposition to a certain disease but it had not at that time developed so as to incapacitate him from continuously carrying on a gainful occupation, and after the issuance of the policy and while it was in force that disease developed to such an extent as to render him totally and permanently disabled it would be a violation of the terms of the policy and he would be entitled to recover. That is a question of fact for you to determine from the testimony in this case."

Plaintiff's requested instruction would have given plaintiff the benefit of the provision that he should be conclusively held to have been in sound physical condition upon the date of his enlistment. That every veteran is entitled to this presumption was held in the case of Jackson vs. United States of America, 24 Fed. (2) 981, Sections 1 to 3.

With like effect, we refer the Court to the case of United States vs. Eliasson, 20 Fed. (2) 851. In the Eliasson case, this same Court was called upon to determine whether or not an instruction under Section 200 of Title 2 of the World War Veterans Act of 1924, as amended by the Act of July 2, 1926, 44

Stat. 793, being the same section as quoted above, Chapter 10, Section 471, Title 38, U. S. Code Annotated, was applicable in a case involving a policy of War Risk Insurance. The Court held, in the Eliasson case, supra, that it was not error to have given an instruction premised upon the foregoing Section of the Act. The Eliasson case involved an element where there was a presumption that might be overcome by clear and convincing evidence. In this, the Brandaw case, we are dealing with a portion of the law which specifically says that the Veteran shall be **conclusively held** to have been in sound condition, etc., except as to defects noted on his enlistment record. In other words, in the Brandaw case, we are not dealing with a presumption, but we are dealing with a positive enactment that precludes any element of doubt.

This man was at the time of his discharge and now is an epileptic. The inception of his disability is not contested. That permanent and total disability existed at this time is not contested. He has been under guardianship throughout these years. The Court permitted the Government to introduce testimony, defendant's Exhibit 11, which left the defendant free to argue that the man was only in service two months; that his disability was congenital, and that it arose prior to his induction into the service. The Government accepted him as fit; he entered the service; he signed the contract for insurance; he paid the premiums provided by law, yet he is denied the benefits thereunder, under the instructions of the Court.

The Government should not be permitted to play

fast and loose with those who were willing and who did enter military service for the accomplishment of the ends sought by this Government. Jagoding vs. United States of America, 295 Fed. 915.

We submit that under the ruling in the Eliasson case, supra, the Court should have given this requested instruction, and for this manifest error the cause should be remanded for a new trial.

Respectfully submitted,

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